No. 20,220

IN THE

United States Court of Appeals

For the Ninth Circuit

GERARD JOSEPH LAVOIE,
Petitioner,

vs.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

OPENING BRIEF FOR PETITIONER

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INTRODUCTION

This is a petition for the review of an order of the Immigration and Naturalization Service (hereinafter "the Service") directing petitioner's deportation to Canada. The order was grounded on a finding that petitioner was an alien "afflicted with psychopathic personality" (Sections 241[a] [1] and 212[a] [4] of the Immigration and Nationality Act [hereinafter "the Act"], 8 USCA §§ 1251 [a] [1] and 1182[a] [4]).

The contentions of petitioner are:

1. That the conclusion that he was "afflicted with psychopathic personality" is not supported by "rea-

sonable, substantial, and probative evidence" (Section 242[b] [4] of the Act, 8 USCA 1252[b] [4]).

2. That the statute upon the basis of which his deportation was ordered is void for vagueness on its face and as applied to him (*Fleuti v. Rosenberg,* 302 F. 2d 652).

3. That evidence was obtained from him in violation of his rights under the United States Constitution (*Massiah v. United States,* 377 U.S. 201; *Escobedo v. Illinois,* 378 U.S. 478).

JURISDICTION

This Court's jurisdiction to review the order of deportation rests upon Section 5a of the Act of September 26, 1961, 75 Stat. 651 (8 USCA 1105a). *Fleuti v. Rosenberg,* 302 F. 2d 652, 653 n. 1.

STATEMENT OF THE CASE

Petitioner, a national of Canada, entered the United States for permanent residence in 1960.[1] In May or June of 1961 petitioner was arrested in San Francisco

[1]The "Certified Administrative Record" (hereinafter "R."), filed herein pursuant to 72 Stat. 951 (5 USCA 1036) and 72 Stat. 941 (28 USCA 2112), reflects that petitioner's first entry was on January 26, 1960, and that his last entry was on May 5, 1960, "as a returning resident" (R. 2). There is here no problem concerning which "entry" was the critical one such as was presented in *Rosenberg v. Fleuti,* 374 U.S. 499, since there is here no question of the application of different statutory standards between January and May of 1960.

and ultimately pleaded guilty in the Municipal Court to the charge of violating a section of the Police Code (R. 60) relating to lewd and indecent acts.[2] This arrest "precipitated [the] deportation proceeding" (R. 164). The first interrogation took place in August of 1961 (R. 187). Thereafter, the Service issued an Order to Show Cause directed against petitioner (R. 185), hearings were held, and the Special Inquiry Officer made an order directing petitioner's deportation (R. 96-101). On appeal, the Board of Immigration Appeals remanded the case "for the purpose of clarity" in order to have included in the record certain excerpts from a United States Public Health Service manual and for the "characterization of the respondent's [petitioner's] disorder" in the light thereof (R. 68). After further hearings the Special Inquiry Officer again ordered deportation (R. 16-19) and this time the Board of Immigration Appeals dismissed the appeal (R. 2-6), rejecting petitioner's contentions which are the same as those which he makes here (compare R. 79-80, 13-14 with the Petition for Review filed herein, especially Point IX). The instant petition was timely filed and the matter is now before this Court for Decision.

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[2]Municipal Police Code Section 215: "It shall be unlawful for any person to engage in or be a party to or to solicit or invite any other person to engage in or be a party to any lewd, indecent or obscene act or conduct."

As the Special Inquiry Officer observed, the charge "does not set forth any descriptive matter which would help us to determine whether or not he is a sex deviate. You can engage in lewd, indecent and obscene acts and be very normal as far as sexual conduct is concerned" (R. 109).

SPECIFICATION OF ERRORS

1. The order for deportation of petitioner is invalid because it is not based upon "reasonable, substantial, and probative evidence". Section 242(b)(4) of the Act, 8 USCA 1252(b)(4).

2. The execution of the order of deportation would violate the Due Process Clause of the Fifth Amendment because the statute, in using the term "psychopathic personality", is, on its face and as applied to petitioner, void for vagueness. The Service erred in failing to follow and apply this Court's decision in *Fleuti v. Rosenberg,* 302 F. 2d 652.

3. The execution of the order of deportation would violate the Due Process Clause of the Fifth Amendment because there was used against petitioner, over objection, a statement obtained from him during an interrogation in which he was not advised of his right to counsel. *Massiah v. United States,* 377 U.S. 201; *Escobedo v. Illinois,* 378 U.S. 478.

SUMMARY OF ARGUMENT

1. The evidence does not support the finding that petitioner was "afflicted with a psychopathic personality". Apart from the constitutional vagueness of the term, which is the subject of the second point of this brief, it is petitioner's contention that there is no "reasonable, substantial, and probative evidence" (8 USCA 1252[b] [4]) that petitioner is "afflicted with a psychopathic personality". The evidence in the

record demonstrates that petitioner at most is suffering from a mild neurosis as a result of which he has confused feelings and reactions with relation to sexual matters. The evidence does not demonstrate that petitioner is, in any sense of the words, a "true" homosexual or sexual deviate and certainly does not establish that he is "psychopathic".

The testimony of both psychiatrists—one produced by the Service and the other by petitioner—is in essential agreement on these underlying facts. The government psychiatrist, however, under the compulsion of a government manual, was required to characterize petitioner as psychopathic, although he expressed grave doubts about the appropriateness of the classification and the terminology used in the government manual. Furthermore, he reached this conclusion, which he himself characterized as a tentative diagnosis, on the basis of a hasty interview and considered that a more thorough examination might well have produced a different result. Such an examination over an extended period of time was conducted by Dr. Bernard Diamond, a psychiatrist with impressive credentials, who made it clear that, in no sense of the word, was petitioner psychopathic but that at most he was suffering from a mild emotional disturbance which was now under control.

2. The term "psychopathic personality" is so vague and indefinite that it gives no fair warning that persons like petitioner may fall within its terms. Its unconstitutionality for this reason was established by this Court's decision in *Fleuti v. Rosenberg,* 302 F.

2d 652, and the record in the instant case simply reinforces everything which this Court stated in its *Fleuti* opinion on the subject. Nothing has transpired in the three years since this Court decided *Fleuti* which would even suggest that the case should not now be followed.

3. At the time petitioner was first interrogated by an agent of the Service and gave testimony upon the basis of which findings adverse to him were later made, he had no counsel present and he was not advised of his right to counsel. Under the doctrine of *Massiah v. United States,* 377 U.S. 201, and *Escobedo v. Illinois,* 378 U.S. 478, evidence so obtained is inadmissible in a criminal trial. The consequences of deportation being as drastic as they are, the protections with which the Constitution surrounds criminal trials should also be applied in deportation proceedings and the statement should have been excluded.

ARGUMENT

I

THE EVIDENCE DOES NOT SUPPORT THE FINDING THAT PETITIONER WAS "AFFLICTED WITH A PSYCHOPATHIC PERSONALITY".

The Special Inquiry Officer "found" (1) that petitioner had "engaged in homosexual acts over an extended period of time", (2) that, therefore, petitioner was a "homosexual", (3) that "as such" petitioner was a sexual deviate, and (4) that petitioner was

therefore deportable as one "afflicted with a psychopathic personality" (R. 19).

It is submitted that the evidence does not support these findings. In this connection it must be remembered that, in Section 242(b)(4) of the Act (8 USCA 1252[b][4]), Congress has decreed that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence". See *Gastelum-Quinones v. Kennedy,* 374 U.S. 469, 479; cf. *Bridges v. Wixon,* 326 U.S. 135, 154-156.[3] To reach his conclusion that petitioner was deportable, the Special Inquiry Officer had to build an elaborate structure, no level of which was supported by its purported underpinning.

The evidence consists of (1) a statement made by petitioner to an agent of the Immigration and Naturalization Service (R. 187-195),[4] (2) a written report by a government psychiatrist (R. 196-198),[5] and

[3]The Court of Appeals for the Second Circuit has just recently held that in cases involving "long-time resident aliens" the government should be required to carry the even higher burden of proving "beyond a reasonable doubt" the facts upon which deportation depends. *Sherman v. Immigration and Naturalization Service,* ..... F.2d ....., 34 U.S.L. Week, 2169-2170 (C.A.2, September 22, 1965). We need not go so far in this case. Here there is simply no "reasonable, substantial, and probative evidence" to sustain the order.

[4]When this statement, which was the basis of significant adverse findings (R. 3, 17, 63, 97), was taken, petitioner was not advised of his right to counsel (R. 104-105). See *infra,* III, for a discussion of the legal significance of this fact.

[5]The manner in which the psychiatrist's interview was procured raises disquieting questions about how the Service operates. At the time the investigator was taking the statement and when petitioner was without counsel, the petitioner was asked whether he would "be willing to discuss your problems with a United States Public Health psychiatrist" and answered that he would (R. 192).

(3) oral testimony of the government psychiatrist (R. 25 et seq. and 112 et seq.) and of a defense psychiatrist (R. 153 et seq.).[6]

From this entire record it is clear that petitioner, now 41 years of age, first observed, about 20 years ago, that his sexual urges were directed toward other males (R. 189) but that he did nothing about this then believing "it was just a passing phase" (*ibid.*). In the statement to the Immigration and Naturalization Service investigator, petitioner reported that from 1946 to 1948, he had perhaps half a dozen homosexual "experiences".[7] From 1948 until 1949 he stated that he had such "experiences" at the rate of one or two a month (*ibid.*) and from 1959 to 1961 only a total, all told, of five or six such "experiences" (R. 190). During the same periods of time he engaged in *heterosexual* intercourse at least 30 times (*ibid.*).

During the course of that "discussion", the psychiatrist by his own admission "took advantage" of petitioner's guilt feelings about his sexual problems to secure what the psychiatrist regarded as an "admission of damaging facts" (R. 197).

In fact, as we shall see, the "admission" is not damaging at all, as the government doctor ultimately conceded.

[6]It is instructive to compare the qualifications of the two doctors. Dr. Beittel is a relatively young man whose psychiatric experience was comparatively limited (R. 113-114), while Dr. Diamond is a psychiatrist of over 20 years experience with impressive credentials both in the medical, academic and military worlds (R. 154-155). It is also instructive to note that the government psychiatrist spent a brief hour with petitioner (R. 142) and considered that if he could have had more time he might well have changed his views about petitioner (R. 37, 51, 121, 142), whereas Dr. Diamond spent at least eight times as long with petitioner over an extended period of time for both examination and treatment (R. 155).

[7]It is clear that when petitioner spoke of "homosexual experiences" he included other matters besides overt physical contact. He was also referring to "any kind of even thought or glance or look at another man . . ." (R. 180) that never even ripened into overt behavior.

We do not believe that this history constitutes "reasonable, substantial, and probative evidence" to support the finding that petitioner had "engaged in homosexual *acts* over an extended period of time". Yet upon this uncertain basis the Special Inquiry Officer erected the first level of his structure. That is, based upon this finding, he drew another finding: that petitioner was a "homosexual". However, a review of the evidence does not at all establish that petitioner is indeed a homosexual.

The government doctor reported that petitioner's characterization of himself as a homosexual was "not completely correct" (R. 197). He pointed out that petitioner's major mode of sexual gratification since puberty and continuing up to the present time had been masturbation (not homosexuality) *(ibid.)*. In his oral testimony the government doctor made it clear that an "admission" of homosexuality such as that made by the petitioner at the time of the original interrogation was unreliable because often in these cases such an admission was simply not true (R. 119; see Dr. Diamond to the same effect at R. 174-175). The government doctor testified that he could not say that petitioner was a homosexual.

> "Q. Now, I notice in your report that you have some doubt in your mind as to whether Mr. Lavoie is a homosexual. Do I properly state that?
>
> A. That's correct.
>
> Q. In other words, as you sit there now, you wouldn't positively state that Mr. Lavoie is a homosexual?
>
> A. No, I wouldn't." (R. 117-118)

because] . . . [t]here are difficulties in using it in its present form" (R. 41), he nonetheless agreed that if the Service "tell[s] you that the legal term [psychopathic personality] is the equivalent of 'personality disorder' " he would accept "that" (R. 42). Yet he had just immediately previously testified that "I can't say whether it is equivalent or not" (R. 42) and he testified shortly thereafter that to make such an equivalence "doesn't make sense" (R. 45).

Furthermore, the "requirement" of the manual that every sex deviate should be certified as a psychopathic personality is totally contrary to Dr. Beittel's psychiatric training, which tells him that this is simply not true, that sexual deviation can be based upon neuroses (R. 31, 50) as well as upon "psychopathic personality" (whatever that means), and that, indeed, "the majority of homosexual behavior is on a psychoneurotic basis" (R. 55).

The conclusion that petitioner is "afflicted with a psychopathic personality" was, at best, forced upon the doctor by the "requirements" of a government manual. It is surely not supported by evidence, much less by "reasonable, substantial, and probative evidence".

We have heretofore reviewed principally the evidence produced by the government. Even unchallenged, this evidence fails to support the deportation order. When one considers also Dr. Diamond's testimony[11]

[11]As a result of Dr. Diamond's extensive examination, he concluded that petitioner was not afflicted with a "psychopathic personality", but rather was suffering from "an emotional disturbance,

and applies to the entire record the rule of *Universal Camera v. National Labor Relations Board,* 340 U.S. 474,[12] it becomes doubly clear that the evidence simply will not support the order. For this reason alone the order of deportation should be set aside.

II

THE STATUTE UPON THE BASIS OF WHICH PETITIONER WAS ORDERED DEPORTED IS VOID FOR VAGUENESS ON ITS FACE AND AS APPLIED TO PETITIONER.

In *Fleuti v. Rosenberg,* 302 F. 2d 652, decided just three years ago, this Court squarely held:

> "The conclusion is inescapable that the statutory term 'psychopathic personality', when measured

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emotional illness, which I consider to be psycho-neurotic" (R. 157). Dr. Diamond found "no evidence at all of a character disorder, psychopathic or otherwise" (R. 158-159). At the most, Dr. Diamond could find that on occasion petitioner had exercised poor judgment, but that this had not been the result of a psychopathic condition but "the result of an emotional confusion about certain aspects of sexuality. I do not even regard him as a homosexual in any sense of the word" (R. 161).

The doctor pointed out the absence of factors which characterize the "true homosexual": no molesting of children, no interest in adolescents, no sustained relationships "with some abnormal individual in any perverted way", no feminine characteristics, no love affairs with men (R. 162-163). The homosexual "experience" (see n. 7, supra) were "extremely superficial, extremely casual" (R. 163) and ". . . in between the scattered homosexual contacts he has had perfectly normal relationships with women" (R. 162).

In sum, Dr. Diamond believed that petitioner had "a relatively mild type of emotional disturbance characterized chiefly by some confusion as to sexuality . . . and I think we clarified this in [the] second therapeutic visits [sic]. And I think he knows quite well where he stands now . . ." (R. 169). Petitioner was (and is) willing to undergo psychiatric treatment but Dr. Diamond does not think this is now necessary (R. 168).

[12]"The substantiality of evidence must take into account whatever in the record fairly detracts from its weight" (340 U.S. at 488).

> by common understanding and practices, does not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein. Since this statutory term thus fails to meet the test to be applied in determining whether a statute is vague in the constitutional sense, we hold that the statute is void for vagueness, as applied in this case. Enforcement of the order of deportation would therefore deprive Fleuti of the due process of law." (302 F. 2d at 658)

In the instant case, the Service refused to follow this Court's view because in *Rosenberg v. Fleuti,* 374 U.S. 449, the "constitutional question was bypassed" and "therefore remains unresolved" (R. 6).[13] We submit that this Court's decision in *Fleuti* was correct and compels the setting aside of the order in this case.[14]

This Court's decision in *Fleuti* resulted from a careful reading of the generally available literature dealing with the meaning of the term "psychopathic personality" (302 F. 2d at 657-658 and, especially, notes 15, 17, 18 and 19) as well as a careful review of the

---

[13]The Supreme Court's decision in *Fleuti* went off on a point not here involved, n. 1, supra. After the Supreme Court's remand Fleuti was again ordered deported, the Service refusing to deal with the constitutional question; however, the deportation order was suspended (Section 244 of the Act, 8 USCA 1254) and it is therefore unlikely that Fleuti's case will be before the courts again *(In the matter of George Ernst Marcel Fleuti,* Immigration and Naturalization Service, file number A 8,382,428).

[14]We do not consider here the points decided in *Fleuti* that the constitutional question cannot be avoided and that the void for vagueness doctrine applies to deportation statutes (302 F.2d at 654-655). The law on these points seems well settled and we do not understand the Service to challenge the *Fleuti* decision on these grounds.

testimony of the doctors in that case (302 F. 2d at 657 and, especially, notes 13 and 14).

As to the first of these matters: so far as we are aware—and so far as this record reveals—there has been no change since 1962 in the views expressed in the general literature on the subject. No one has suggested that a term which this Court found to be constitutionally vague in 1962 has, in the intervening three years, somehow or other become so precise as to pass constitutional muster.[15]

As to the records before the Court: in *Fleuti* the doctors "gave widely varying meanings to the term 'psychopathic personality'" (302 F. 2d at 658); here the doctors expressed grave difficulty in even fixing upon *any* meaning for the term or whether, if it had a meaning, it could be applied to petitioner.

To Dr. Diamond the term was "obsolete" (R. 157) as it apparently is to the American Psychiatric Association (R. 170). At least it is no longer used by that Association or by "hardly any psychiatrist today" (*ibid.*). The difficulty arises, in part at least, because the statute employs an obsolete, uncertain psychiatric

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[15]The Public Health Service, which participated in framing the legislation in 1952 (see *Fleuti*, 302 F.2d at 654, n. 4), recognized that "the term 'psychopathic personality' . . . is vague and indefinite" (R. 169; quoting from U. S. Code, Congressional Administrative News, Volume II, 82 Cong. 2nd Sess., 1952) and the government representatives at the administrative hearing herein speculated at great length about how Congress *might have drafted* the legislation (R. 177-178). But in spite of all of this, we are not aware of any effort by Congress to deal with this matter since this Court's decision in *Fleuti*. See *Apex Hosiery Company v. Leader*, 310 U.S. 469, 487.

term instead of what the government attorney called "laymen's terms" (R. 177). Laymen and professionals alike simply cannot tell from the face of the statute what is or what is not to be included (R. 177-178).

Dr. Beittel agreed that the term "psychopathic personality" causes "difficulties in the medical profession regarding precisely what it means" (R. 33), that it has "no precise medical meaning" (R. 35), that it is a "difficult term for a layman to even hazard a guess as to what it means" (R. 35), and that it is a term for which, as a doctor, he has no "precise definition" (R. 42).

Perhaps the best way to conclude this portion of the brief is to quote Dr. Beittel:

> "Q. As I understand it, doctor, both legally and medically this is very confusing, isn't it?
> A. Yes, the guidelines are not clear." (R. 57)

In any case, as previously indicated (*supra,* pages 10-11), it is clear that whatever it means, the statutory term does not, either on its face or on the facts of this case, apply to petitioner.

This record thus demonstrates the absolute soundness of this Court's decision in *Fleuti.* It reinforces the conclusion there reached "that the statutory term 'psychopathic personality', when measured by common understanding, does not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein" (302 F. 2d at 658).

For this reason also the order of deportation should be set aside.

III

PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE, ALTHOUGH HE WAS NOT ADVISED OF HIS RIGHT TO COUNSEL, STATEMENTS MADE BY HIM WHILE UNDER INTERROGATION WERE USED AGAINST HIM.

Massiah v. United States, 377 U.S. 201, teaches us that the Sixth Amendment guarantees the right to counsel to a federal criminal defendant who is "under interrogation by the police" (377 U.S. at 204) and *Escobedo v. Illinois,* 378 U.S. 478 that when an investigation begins to fix upon a particular person he is entitled to counsel; that at that point the due process clause of the Fourteenth Amendment (and certainly this must be equally true of the due process clause of the Fifth Amendment) requires that he be advised of that fact; and that if he is not, "no statement elicited . . . during the interrogation may be used against him . . ." (378 U.S. at 491).

In the instant case, it is not disputed that at the time petitioner was first under interrogation by an agent of the Service, he was not advised of his right to counsel (R. 104-105);[16] nor can it be doubted that petitioner and petitioner alone was the sole subject of the investigation.[17] Thus the factual preconditions for the application of the *Massiah-Escobedo* doctrine exist in this case.

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[16]Section 242(b)(2) of the Act provides a procedure to be followed for the determination of deportability and specifically states that in any such proceedings "the alien shall have the privilege of being represented . . . by such counsel . . . as he shall choose" (8 USCA 1252 [b][2]). That the initial interrogation was a part of the deportation proceeding is obvious and it is clear that the Service so regarded it. See n. 17, *infra.*

[17]"Q. . . . Do you understand that this *hearing* is for the purpose of making a determination of *your* legal status under the

The only question is whether because this is a deportation proceeding and not a criminal prosecution the rule should be any different. The answer would clearly appear to be that this should make no difference.

> "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon,* 326 U.S. 135, 154.

See also *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10; *Barber v. Gonzales,* 347 U.S. 637, 642; *Delgadillo v. Carmichael,* 332 U.S. 388, 391; *Costello v. Immigration and Naturalization Service,* 376 U.S. 120, 131; *Sherman v. Immigration and Naturalization Service,* ..... F. 2d ....., 34 U.S.L. Week 2169-2170 (C.A. 2d, September 22, 1965).

The statement made at this interrogation was a substantial basis upon which findings adverse to petitioner were made (R. 17, 63-64, 97). Objection was duly made to the admissibility of the statement (R. 104) but was overruled (R. 105).

Immigration laws of the United States and *this will go through a hearing before a Special Inquiry Officer?*

A. Yes, sir, I do.

Q. *Mr. Lavoie,* my investigation discloses that it is possible that *you* are a homosexual . . ." (R. 189; italics supplied).

The error in receiving this evidence against petitioner is, on the facts of this case, of constitutional dimension and requires the setting aside of the order of deportation, independently of the other grounds heretofore urged.

CONCLUSION

For each of the foregoing reasons taken separately and for all of them taken together, the order of deportation is void and should be set aside.

Dated, San Francisco, California,
October 28, 1965.

Respectfully submitted,
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By NORMAN LEONARD,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN LEONARD,
Attorney for Petitioner.

(Appendix Follows)

Appendix.

Appendix

LIST OF EXHIBITS
Pursuant to Rule 18(2)(f)

		Record Reference
Exhibit 1.	Order to Show Cause and Notice of Hearing	103, 185
Exhibit 2.	Record of sworn statement of petitioner, August 30, 1961	105, 187
Exhibit 3.	Two (2) letters relating to petitioner dated October 9, 1961 and October 23, 1961, respectively, from Dr. Daniel Beittel to the Immigration and Naturalization Service	108, 196
Exhibit 4.	Additional charge of deportability (merely adding a later date of entry)	183, 199
Exhibit 5.	Certified copy of minute order in Municipal Court of San Francisco, People v. Lavoie	24, 60